IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
NO. 2011-M-00358-SCT

CHASE HOME FINANCE, LLC AND PRIORITY TRUSTEE SERVICES OF MISSISSIPPI, LLC — **APPELLANTS/CROSS-APPELLEES/ DEFENDANTS**

VS.

JAMES D. HOBSON, JR. — **APPELLEE/CROSS-APPELLANT/ PLAINTIFF**

On Interlocutory Appeal from the Circuit Court
of Warren County, Mississippi, Ninth Judicial District
(Cause No. 75CI1:10-cv-0001)

REPLY BRIEF OF APPELLEE/CROSS-APPELLANT JAMES D. HOBSON, JR. ON CROSS APPEAL

ORAL ARGUMENT NOT REQUESTED

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SUMMARY OF THE ARGUMENT

The damages awarded to Hobson by the County Court on Motion for Summary Judgment should be reinstated. Chase only contested liability in the trial court, and never contested the applicable measure of damages, Hobson's evidence of damages or Hobson's claim for attorney fees. Therefore, Chase did not preserve the issue of damages for appeal to the Circuit Court and the Circuit Court should not have remanded this case for trial on the issue of damages.

ARGUMENT

In the County Court, Cross-Appellant James D. Hobson, Jr. (hereinafter "Hobson") presented undisputed, uncontradicted evidence, through appraisal and supporting affidavits, that the value of the subject property on the date of the foreclosure sale was $156,000.00. (R. 40, 44, 55). Contrary to Chase's assertion[1], said evidence was not presented through "just Hobson's own affidavit". (Chase Response Brief, P. 11). In addition to Hobson's testimony, the affidavit of licensed real estate appraiser Bobby Bottin and his appraisal of the subject property are attached to Hobson's Motion for Summary Judgment as Exhibit "E." (R. 42-53). Bottin's affidavit and appraisal show specifically that the value of the subject property on the date of the foreclosure sale was $156,000.00. (R. 44, 48).

Chase contends, without any supporting citation to the record, that the Circuit Court reversed the County Court because Hobson's proof of damages is not "clear." (Chase response, P. 11). The Circuit Court made no such finding or ruling. As explained in Hobson's opening brief on this cross-appeal, Chase provided no evidence to contradict Hobson's affidavit and appraisal evidence and made no effort to dispute Hobson's evidence of damages. To now suggest that Hobson's evidence of damages is not "clear" when the evidence was never contested is simply incredible. We repeat once more for emphasis the well known rule that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Miss.R.Civ.P. 56(c). The party opposing the motion

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[1] Cross-Appellees Chase Home Finance, L.L.C. and Priority Trustee Services of Mississippi, L.L.C. shall be collectively referred to as "Chase".

"may not rest upon the mere allegations or denials of his pleadings, but his response, ***by affidavits or as otherwise provided in this rule***, must set forth specific facts showing that there is a genuine issue for trial. ***If he does not so respond, summary judgment, if appropriate, shall be entered against him.***" Miss.R.Civ.P. 56(e). (emphasis added).

Additionally, Chase now, for the first time, apparently seeks to contest Hobson's contentions regarding the applicable ***measure of*** damages. (See Chase Response, P. 12). Hobson contends that he should be compensated based on his "**expectation interest**" and that he should receive the **benefit of the bargain** by awarding him a sum of money that will, to the extent possible, put him in as good a position as he would have been in had the contract been performed." *Houston v. Willis*, 24 So.3d 412, 421-22 (Miss.App. 2009) (quoting *Theobald v. Nosser*, 752 So.2d 1036, 1042 (Miss. 1999)). Chase did not contend in the County Court that the measure of damages proposed by Hobson was incorrect nor did Chase suggest to the trial judge that some other measure of damages was appropriate. To the contrary, as noted in our opening brief, Chase in its brief to the Circuit Court admitted that it has "not appealed the measure of damages." (R.170).

Even if Chase had properly preserved the issue of the measure of damages for appeal, Chase cites no authority in its brief for the proposition that the lower court should have applied some different measure of damages. Rather, Chase cryptically and confusingly tries to distinguish *Theobald, supra*, by asserting that the trial court applied the incorrect measure of damages because there is "no written contract in this case" and, therefore, "no liquidated damages clause that would make a judicial determination of damages appropriate." (Chase Response, P. 11). This is an odd statement and we are not sure what Chase is contending. However, it is sufficient to say that Chase consistently has failed to cite any case supporting the notion that the trial court incorrectly applied

the measure of damages articulated in the *Houston* and *Theobald* cases cited above.

Once again, Chase tries to justify its failure to properly respond to the summary judgment motion by complaining about an alleged lack of opportunity for discovery. Chase asserts that the appraiser and Hobson "are subject to cross-examination." (Chase Response Brief p. 12). Hobson has discussed this point in his opening brief and will not belabor the point here, except to point out that Hobson and Bottin's affidavits and Bottin's appraisal were attached to Hobson's Motion for Summary Judgment which was filed on September 12, 2008. The motion was not heard until November 9, 2009. Had Chase and Priority desired to cross-examine Hobson or Bobby Bottin regarding their affidavits or the appraisal, they had ample opportunity to arrange for the taking of their depositions. Furthermore, we will repeat for emphasis that neither Chase nor Priority filed a Rule 56(f) motion stating that they needed additional discovery in order to oppose Hobson's motion. Therefore, Chase should not be allowed to complain to this Court, as they complained to the Circuit Court, about any lack of opportunity to conduct discovery.

More importantly, Chase would have been afforded an opportunity to cross examine Hobson and Bottin if Chase had properly responded to the Motion for Summary Judgment with evidence contradicting Hobson's evidence of damages as established by Bottin's appraisal. Stated another way, if Chase had properly demonstrated the existence of a genuine issue of fact regarding the value of the subject property by submitting evidence contradicting Bottin's appraisal, the trial court clearly would have conducted a trial on that issue and Chase would have been afforded a full opportunity to interrogate Hobson and all of his witnesses. However, Chase clearly lost its opportunity to cross examine Hobson's witnesses at trial when it failed to properly demonstrate to the trial court that a genuine issue of fact existed on the issue of damages.

Hobson further asserts that because Chase failed to present any evidence as to damages, failed to file any affidavits relating to damages, and wholly failed to rebut Hobson's evidence as to damages, Chase should not be allowed to do so now. Clearly, since Chase only contested liability in the trial court, and never contested Hobson's evidence of damages or put on any evidence to create a genuine issue of fact as to damages, the Circuit Court had no basis to remand this case for trial on the issue of damages.

Finally, Chase did not contest Hobson's claim for attorneys fees. After the trial court ruled on all other issues, Chase did not contact the court administrator to ask for a hearing on the attorney fee issue as it was required to do by the judge.[2] As a result, the judgment of the County Court specifically states:

> [f]urther, the Court finds that Defendants' **breach was grossly negligent and therefore amounted to an independent tort** entitling Plaintiff to his reasonable attorney's fees and expenses in the amount of $10,868.60, ***there being no objection by the Defendants to same during the time allotted by the Court.*** (R. 109).

Even if Chase had contested Hobson's attorney's fee claim, "a trial court's decision on attorneys fees is subject to the abuse of discretion standard of review." *Sentinel Indust. Contracting Corp. v. Kimmins Indust. Serv. Corp.*, 743 So.2d 954, 970-71 (Miss. 1999). Chase has presented no evidence that the County Court judge abused his discretion in awarding Hobson his attorney's fees. Furthermore, the Circuit Court, on appeal, made no finding of abuse of discretion in its order. Finally, even if Chase had preserved this issue for appeal, a finding of gross negligence justifying

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Chase and Priority have asserted that Hobson's references to the County Court's summary judgment hearing transcript should not be considered by this Court because the transcript is not in the Record. Hobson has filed a motion with this Court pursuant to Miss.R.App.P. 10(e), asking that the Record be corrected to include this transcript as it was part of the record in the Circuit Court and Chase and Priority designated the entire record on this appeal. Furthermore, Chase and Priority attached a copy of the County Court transcript to their Petition for Interlocutory Appeal.

an award of attorney's fees is supported by the record. In fact, Chase admitted gross negligence when it admitted that it conducted the foreclosure sale when it "did not have the right to convey the subject property at the foreclosure sale, because Quimby reinstated under the Deed of Trust" (Chase's Response, p. 15) and by admitting that Chase had no idea when this reinstatement occurred. (T. 6-7). Therefore, the County Court's award of damages and attorney's fees should be affirmed.

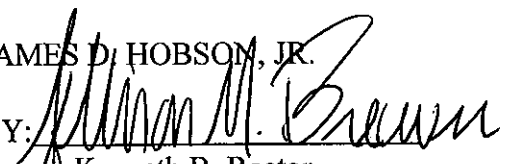
CONCLUSION

Based on the undisputed, uncontradicted evidence, the County Court did not err in its award of damages. Hobson presented sworn evidence as to the value of the property on the date of the foreclosure sale. Chase failed to present any contradictory evidence as to the property value and therefore failed to create a genuine dispute on the issue of value that would have precluded the grant of summary judgment in Hobson's favor. Further, Chase did not contest in the trial court the measure of damages that Hobson contends is applicable to his claim. Lastly, there is record evidence that supports the County Court's finding of gross negligence to support the award of attorney's fees. Chase and Priority failed to contest the award of attorney's fees, failed to preserve this issue for appeal, and the Circuit Court did not find the award of attorney's fees to be an abuse of discretion.

Therefore, this Court should affirm the Circuit Court's Order affirming the County Court's judgment as to liability. This Court should also reverse the Circuit Court's Order as to the damage portion of this suit and reinstate the judgment of the County Court.

Respectfully submitted,

JAMES D. HOBSON, JR.

BY: 

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CERTIFICATE

I, Allison M. Brewer, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing to:

CIRCUIT COURT JUDGE:
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COUNTY COURT JUDGE:
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THIS 15th day of September, 2011.

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